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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CIRO D'AMBROSIO, PETITIONER

V.

BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTION PRESENTED

Whether petition was denied his right to due process of law under the Fourteenth Amendment when his amended petition, filed with the New Jersey Commissioner of Education, alleging employment discrimination on the basis of national origin, was dismissed on its face on the ground that it was insufficient.

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Petitioner Ciro D'Ambrosio prays that a writ of certiorari issue to review the order of the New Jersey Supreme court in this case.

OPINIONS BELOW

There was no opinion of the Supreme Court of the State of New Jersey. The order denying the petition for certification (Appendix A) has not yet been reported.

The opinion of the New Jersey Superior Court, Appellate Division (Appendix B) was not reported.

The decisions of the New Jersey State Board of Education (Appendix C), the Commissioner of Education (Appendix D), and the Administrative Law Judge (Appendix E), have not yet been reported.

JURISDICTION

The Order of the New Jersey Supreme Court was entered on March 24, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Ciro D'Ambrosio, a non-tenured teacher with Respondent Board of Education of the Warren Hills Regional School District, Warren County, New Jersey, was advised in April, 1978 that his contract would not be renewed. The reasons set forth were lack of acceptable performance in verbal presentation of the subject matter, and in English enunciation. For unspecified reasons, respondent nevertheless rehired petitioner for the 1978-1979 school year. In April, 1979 respondent again informed petitioner that his contract would not be renewed. This time, the reasons given were unsatisfactory teaching performance.

Petitioner filed a Petition of Appeal and an Amended Petition of Appeal (Appendix F, 25a) with the New Jersey Commissioner of Education, pursuant to N.J.S.A. 18A:6-9, which gives the Commissioner jurisdiction

to hear and determine all controversies and disputes arising under the school laws. (It is undisputed that the Commissioner has jurisdiction concurrent with that of the New Jersey Division on Civil Rights, N.J.S.A.10:5-1 et seq., to hear a teacher's complaint of illegal employment discrimination.)

The Amended Petition stated that petitioner's evaluations had contained criticism of his ability to speak and use the English language, and alleged that:

> "The reasons proffered by respondent are knowingly and intentionally false, discriminatory and violated petitioner's constitutional statutory rights not to be discriminated against because of his national origin, Italian.
>
> Further respondent's action was in retaliation for his successfully petitioning respondent to renew him for school year 1978-1979." (28a-29a)

Pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the matter was referred

to the Office of Administrative Law. The Administrative Law Judge recommended that the Amended Petition be dismissed on the ground that it contained only "bare and generalized allegations unsupported by specific facts" (23a). On appeal, the Commissioner of Education reversed and remanded for a hearing because of the "paucity of the record" (13a).

> "The Commissioner directs that, in the circumstances of this case, in addition to the regular court stenographer the court use a tape recorder with good sound resolution and with high tonal quality to compile a good acoustical record of petitioner's speech". (13a)

Respondent appealed to the State Board of Education which reversed the Commissioner's decision "for the reasons expressed in the Administrative Law Judges (sic) decision" (10a).

Petitioner appealed to the New Jersey Superior Court, Appellate Division, which affirmed the State Board. The Court noted

that "(p)etitioner had no right to have his contract renewed" (5a), and concluded:

> "On his administrative appeal, even after amending his affirmative pleading, petitioner came forward with only a bare allegation of discrimination because of national origin and a bare claim of retaliatory nonrenewal. On this record the Administrative Law Judge could properly find that petitioner had not "presented a bona fide claim of constitutional stature" and that he was not "entitled to a full evidentiary hearing." Winston [(v.Board of Education of South Plainfield)], supra, 125 N.J. Super. [131 (App. Div. 1973, aff'd 64 N.J. 582 (1974)] at 145. Since the Judge's finding was legally sound, we cannot say that the State Board's ruling "that petitioner had failed to sustain the allegations that his nonrenewal was solely for reasons of his ethnic background" was arbitrary, capricious, unreasonable or contrary to law. As the State Board correctly stated, "it is not appropriate for the Commissioner in a nonrenewal case to substitute (his) judgment for that of the local board." (7a)

Petitioner filed a Petition for Certification with the New Jersey Supreme Court, which was denied without an opinion. (1a)

REASONS FOR GRANTING THE PETITION.

Petitioner, Ciro D'Ambrosio, was denied his right to due process of law under the 14th Amendment to the United States Constitution when his amended petition, filed with the New Jersey Commissioner of Education, alleging employment discrimination on the basis of nationality, was dismissed without a hearing or any investigation. Under this Court's recent decision in Logan v. Zimmerman Brush Company, 102 S.Ct.1148 (1982), the petitioner in the instant case has a protected interest and a right to due process.

In Logan, supra, as in the instant case, the petitioner made a charge of unlawful employment discrimination before a state agency. In Logan, supra, the state statute required the Fair Employment Practices Commission to convene a fact finding conference within 120 days of the

date the charge was filed. The Commission inadvertently failed to do so and the state Supreme Court determined that the legislative directive was mandatory and jurisdictional, and Logan's charge had to be dismissed.

This Court stated at the outset that Logan did have a protected interest.

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." (Citations omitted). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." (Citations omitted).
>
> The right to use the FEPA's (Fair Employment Practices Act) adjudicatory procedures shares these characteristics. A claiment has more than an abstract desire or interest in redressing his grievance. His right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence." 102 S.Ct. at 155.

Similarly in the instant case, petitioner Ciro D'Ambrosio's right to use the adjudicatory procedures of the New Jersey Department of Education is a protected interest. As in Logan, supra, the petitioner in the instant case claims employment discrimination, here on the basis of nationality, in violation of both the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2,000e-1 et seq. Petitioner D'Ambrosio is therefore entitled to have the adequacy of this claim assessed under a "for cause" standard, based upon the substantiality of the evidence. This was not done in the instant case.

As to what process is due, the Court in Logan said:

> "(T)he Due Process Clause grants the grieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "some form of hearing" is

required before the owner is finally deprived of a protected property interest. Board of Regents v. Roth, 408 U.S. [564(1972)] at 570-571, n.8 (Emphasis in original)." 102 S.Ct. at 1156.

". . .Logan is entitled to have the commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and - more intangibly in redressing an instance of alleged discrimination, are all substantial. Id. at 1157.

Petitioner D'Ambrosio, like Logan, was deprived of any form of hearing. He did not have the opportunity to present his case. The merits were not considered, and no evidence was submitted.

In the instant case, the conclusions of the Administrative Law Judge and the New Jersey Superior Court, Appellate Division, that the amended petition was insufficient, were eroneous. The amended petition stated:

10. On or about March 16, 1979, Respondent informed Petitioner that it would not renew his contract as a teacher for school year 1979/1980. The reasons proffered for non-renewal were:

1. Lack of contemporary communications with students.
2. Inability to establish himself as the authority figure in class.
3. Student control is not always satisfactory.
4. Students are confused as to the expectations of teacher. This confusion existed in both academic and behavior matters.

11. The reasons proffered by respondent are knowingly and intentionally false, discriminatory and violated petitioner's constitutional and statutory right not to be discriminated against because of his national origin, Italian.

12. Further respondent's action was in retaliation for his successfully petitioning respondent to renew him for school year 1978-79. (28a-29a)

It is respectfully submitted that these allegations are sufficient to set forth a cause of action for discrimination on the basis of national origin, as well as retaliation.

The Appellate Division, like the Administrative Law Judge, relied on the rhetoric in Winston v. Board of Education of South Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd 64 N.J. 582 (1974):

> "(T)he bare assertion or generalized allegations of a constitutional right does not create a claim of constitional dimensions."

The Appellate Division concluded, on the basis of this statement, that the decision of the Administrative Law Judge was "legally sound" (7a). However, an analysis of Winston, supra, which was lacking from the decisions of both the Administrative Law Judge and the Appellate Division, shows that the opinion in Winston, supra, supports the position of petitioner in the instant case, that he is entitled to a hearing.

In Winston, supra, petitioner, a non-tenured teacher was not renewed; an evaluation report of her noted that she had been "overly critical of administrative policy and action." 125 N.J. Super. at 135. She filed a grievance pursuant to the parties' collective bargaining agreement, but the Chancery Division (of the New Jersey Superior Court) stayed arbitration pending exhaustion of administrative remedies. Petitioner thereafter appealed to the Commissioner of Education, alleging that she was penalized for exercise of her First Amendment right to free speech. The Commissioner of Education dismissed her Petition, and the State Board of Education affirmed. The Appellate Division held that

petitioner was entitled to a plenary hearing.

> "Here, Winston has made a sufficient showing that the decision by the respondent local board may have been prompted by her exercise of the right of free speech protected under the First and Fourteenth Amendments. In this sense she presented a bona fide claim of constitutional stature and was, therefore, entitled to a full evidentiary hearing on this contention before the Commissioner of Education." (125 N.J. Super at 145)

In the instant case, as in Winston, supra, there was a sufficient showing that the decision of respondent local Board may have been prompted by petitioner's national origin. Winston, in her petition, specified instances in which she had asserted her right to free speech. Similarly, petitioner in the instant case specified instances in which his language proficiency was severely criticized. In Winston, supra, an

evaluation of Petitioner, through "Administrator's remarks," criticized her for exercise of her right to free speech. In the instant case, petitioner was non-renewed in the spring of 1978 for alleged language deficiency, but the local Board reversed this decision, for reasons which it significantly would not set forth, and rehired petitioner for the 1978-1979 school year. Just as the allegations of Winston's petition raised an inference that she was non-renewed for improper reasons, similarly the allegations of the petition in the instant case raise such an inference.

The Supreme Court, affirming the Appellate Division opinion in Winston, supra, said:

> "We agree and consider the Appellate Division's approach to have been compatible with settled procedural philosophies in the treatment of motions for dismissal and summary judgement. (Citations omitted)" 64 N.J. at 586.

In the instant case, the approach of the Appellate Division was incompatible with the policy and applicable standards governing motions for dismissal. On a motion challenging the legal sufficiency of a complaint,

> "The Plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them." Burg v. State, 147 N.J. Super. 316, 319-320 (App. Div. 1977), certif. den. 75 N.J. 11 (1977).

The New Jersey Supreme Court has applied this standard consistently. Small v. Rockfeld, 66 N.J. 231, 234 (1974); Hackensack v. Rubinstein, 37 N.J. 39, 51

(1962); Rappaport v. Nichols, 31 N.J. 188, 192 (1959).

This Court has also applied the same standard consistently. In Conley v. Gibson, 355 U.S. 45 (1957), black employees asked that their collective bargaining agent be compelled to represent them fairly, under the Railway Labor Act. The Court refused to dismiss the complaint on the ground that it was inadequate.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit." 355 U.S. at 45-46

In the instant case, if petitioner can prove his allegations in his amended complaint that the reasons profferred by respondent, the local board of education, for non-renewing petitioner were false and in violation of petitioner's right to freedom from discrimination of the basis of national origin, he can make out a valid claim. There is a set of facts in support of D'Ambrosio's claim which would entitle him to relief. Neither the Adminstrative Law Judge nor the Appellate Division in the instant case utilized the proper standard, allowing petitioner a liberal interpretation of the contents of the amended petition, and the benefit of all its allegations, as well as the favorable inferences which may be drawn therefrom.

This Court has subsequently used the standard set forth in Conley v. Gibson, supra. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court said:

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence whether by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." 416 U.S. at 236

Accord, McClain v. The Real Estate Board of New Orleans, Inc., 100 S.Ct. 502, 511 (1980).

In Lucido v. Cravath, Swain and Moore, 425 F.Supp. 123 (S.D.N.Y. 1977), this standard was applied in an action involving employment discrimination on the basis of national origin. The court said:

"Lucido in his complaint alleges that as an employee of Cravath he was discriminated against with respect to work assignments, training, rotation and outside work opportunities. These claims constitute allegations of discrimination with respect to 'terms, conditions, or privileges of employment' and 'employment opportunities' under Title VII. While these allegations are general and indefinite, mere vagueness or lack of detail is not grounds for dismissal of

the complaint." (Citations omitted; emphasis added) (Id. at 127).

The Appellate Division in the instant case emphasized that petitioner's "1978-1979 evaluations document (his) performance as mediocre to average. He was given a second chance when the local board rehired him for that term and apparently didn't improve to their satisfaction." (6a). However, it seems obvious that an employer engaging in unlawful discrimination would assert that the reason for its adverse action was unsatisfactory job performance. Is it necessary for an employer to admit discrimination before such a cause of action will be considered? In Logan v. Zimmerman Brush Company, supra, 102 S.Ct. 1148, this Court set forth, among Logan's substantial interests, his interest "in disproving his employer's charges of incompetence." Id at 1157.

The petitioner, Ciro D'Ambrosio, seeks only a hearing so that a determination as to whether or not he was discriminated against may be made on the basis of the facts. The Appellate Division complained that the record lacked "information as to (petitioner's) background, age, employment history etc." (4a). The Appellate Division also noted that the reasons why respondent local board reneged on its decision to non-renew petitioner in April 1978 were "unspecified" (4a). Apparently, the Appellate Division felt these facts were significant. They would be fully explored at a plenary hearing. In the interest of justice a litigant should not be denied the opportunity to present the facts, only to have his appeal denied because the facts were not presented.

The Administrative Law Judge in the instant case reasoned:

> "A teacher's deficiency in speaking and using the English language would certainly seem to be a ground for non-renewal of his contract irrespective of his national origion. Similarly, it would be illogical to conclude that either a Chinese, Russian, Hungarian, Israeli or Egyptian teacher, by way of example, who was deficient in English speaking or usage, and who was not re-employed, was being discriminated against because of his national origin." (20a)

The Appellate Division felt that the Administrative Law Judge's decision was "legally sound." However, it is submitted that a discrimination on account of foreign accent, regardless of which accent or nationality is in question, does indeed constitute improper discrimination on the basis of national origin. A Chinese, Russian, Hungarian, Israeli or Egyptian teacher who was terminated because of his or her accent, when he or she was not, in fact, deficient in English speaking or usage, would be the victim of illegal discrimination on the basis of his or her

Chinese, Russian, Hungarian, Israeli or Egyptian origin.

Moreover, the Administrative Law Judge failed to deal with petitioner's allegation that his speaking and usage of the English language is not at all deficient. In determining whether to grant the Motion to Dismiss, the Administrative Law Judge should have accepted the allegations of the petition as true. However, he failed to do so, and assumed that petitioner was actually deficient in his language without giving petitioner the opportunity to prove to the contrary. This was a finding of fact unsupported by any evidence in the record. Quinlan v. Board of Education, 73 N.J. Super. 40, 46 (App. Div. 1962).

Finally, this Court's recent decision in Kremer v. Chemical Construction Corporation, 28 FEP Cases 1412 (May 24, 1982,) is significant in the instant case. Kremer, an employee who was laid off but

not rehired, filed an employment discrimination charge with the EEOC, which was referred to the New York State Division of Human Rights. After investigating, the SDHR determined that there was no probable cause to believe that the employer had violated the New York Human Rights Law. The New York Human Rights Appeal Board upheld this decision, as did the New York Appellate Court. The petitioner then determined to pursue his cause in the EEOC. Again, there was a finding of no reasonable cause. Kremer brought an action under Title VII in the Federal District Court. This Court held that the state court's determination was res judicata under 28 U.S.C. Section 1738, requiring United States courts to afford the same full-faith-and-credit to state court judgments that would apply in the state's own courts. Thus, Kremer was precluded from pursuing

his employment discrimination action in the federal courts.

In the instant case, petitioner D'Ambrosio has no other way in which to pursue his employment discrimination claim. Under the holding of Kremer, supra, he cannot go to the EEOC, and on to federal courts, if necessary, to pursue his claim. The state court decisions are res judicata. The Court in Logan v. Zimmerman Brush Company, supra, 102 S.Ct. 1448 (1982) also considered the availability of other means of relief to petitioner Logan, and concluded that there were none that were not unduly speculative. Id at 1157 to 1158.

In Kremer, supra, the Court specifically rejected Kremer's contention that the procedures under New York law were inadequate. The Court could not apply 28 U.S.C. Section 1738 unless "the party against whom the earlier decision is

asserted had a full and fair opportunity to litigate the claim. (Citation omitted)." 28 FEP Cases at 1421. These requirements were satisfied since the finding of no probable cause came after an investigation, in which the claimant was entitled to an opportunity to present exhibits and the testimony of witnesses, as well his own testimony, informally. He was also afforded an opportunity to rebut evidence submitted by the respondent.

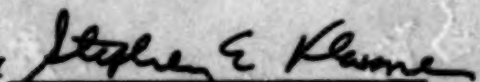
The petitioner in the instant case was afforded none of these advantages. His amended petition was dismissed on its face for failure to state a claim. Under Kremer, supra, he is allowed no other means of pursuing his claim. It is respectfully submitted that D'Ambrosio was denied his 14th amendment right to due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KLAUSNER & HUNTER

BY 
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DATE: June 18, 1982